No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION, CROPLIFE AMERICA, NATIONAL ALLIANCE OF FOREST OWNERS, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. Designation of Unoccupied Critical Habitat Requires that the Specific Areas Be Both Habitat for the Species and Essential to Its Conservation. 10

A. The ESA's Plain Language Limits Critical Habitat to Specific Areas Within Existing Habitat. 10

B. Congress Intended to Limit Critical Habitat to a Subset of the Species' Habitat. 13

C. Designation of Unoccupied Habitat Is a More Demanding Standard that Requires the Entire Area to be Essential for the Conservation of the Species. 17

D. Congress Provided Other Mechanisms for the Identification and Protection of Areas that May Later Become Habitat and Provide Benefits to a Species. 22

II. Judicial Review Applies to Decisions Not to Exclude Areas from Critical Habitat. 23

A. The Fifth Circuit Disregarded the Strong Presumption of Judicial Review of Administrative Action. 25

B. Congress Provided Clear and Meaningful Standards for the Exclusion of Areas from Critical Habitat. 29

C. The Court Has Already Recognized that Judicial Review Applies to Decisions under ESA Section 4(b)(2). 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 25, 26

Alliance for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 20

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 19

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,
515 U.S. 687 (1995) 3, 23

Barlow v. Collins,
397 U.S. 159 (1970) 28

Bear Valley Mutual Water Co. v. Jewell,
790 F.3d 977 (9th Cir. 2015) 28

Bennett v. Spear,
520 U.S. 154 (1997) 12, 29, 34, 35

Cape Hatteras Preservation Alliance v. U.S. Dep't of the Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 20

Center for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 20

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 26

Dickson v. Secretary of Defense,
68 F.3d 1396 (D.C. Cir. 1995) 29

Heckler v. Chaney,
470 U.S. 821 (1985) 25, 26, 27

Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 19

ICC v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987) 28

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 10, 11

Lincoln v. Vigil,
508 U.S. 182 (1993) 28

Mach Mining, LLC v. EEOC,
135 S. Ct. 1645 (2015) 26

Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service,
827 F.3d 452 (5th Cir. 2016) ..... *passim*

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848 F.3d 635 (5th Cir. 2017) ..... *passim*

Mulloy v. United States,
398 U.S. 410 (1970) 28

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 11

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 14, 30

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 11

United States v. Gonzales,
520 U.S. 1 (1997) 19

U.S. Army Corps of Engineers v. Hawkes Co., Inc.,
136 S. Ct. 1807 (2016) 28

Webster v. Doe,
486 U.S. 592 (1988) 28

Statutes and Regulations

5 U.S.C. § 701(a)(2) 24, 26, 27

5 U.S.C. § 704 25

5 U.S.C. § 706(2)(A) 29

16 U.S.C. § 1532(5)(A)(i) 6, 18

16 U.S.C. § 1532(5)(A)(ii) 6, 18, 20

16 U.S.C. § 1533(a)(1) 5

16 U.S.C. § 1533(a)(3)(A)(i) 5, 8, 10, 12

16 U.S.C. § 1533(a)(3)(A)(ii) 23

16 U.S.C. § 1533(b)(2) 5, 6, 23, 24, 34

16 U.S.C. § 1533(b)(3)(D) 23

16 U.S.C. § 1533(f)(1) 22

16 U.S.C. § 1533(f)(1)(B)(i) 22

16 U.S.C. § 1534(a)(2) 22

16 U.S.C. § 1536(a)(2) 3, 7

16 U.S.C. § 1536(b)(4)(A) 7

16 U.S.C. § 1536(b)(4)(C)(ii) 7

16 U.S.C. § 1540(g)(1)(C) 34

50 C.F.R. § 402.02 (2017) 7

50 C.F.R. § 424.12(e) 21

Endangered Species Act of 1973,
Pub. L. No. 93-205, 87 Stat. 884 13

Endangered Species Act Amendments of 1978,
Pub. L. No. 95-632, 92 Stat. 3751 31

Endangered & Threatened Wildlife and Plants:
Final Rulemaking to Designate Critical Habitat
for the Threatened Southern Distinct Population
Segment of North American Green Sturgeon,
74 Fed. Reg. 52,300 (Oct. 9, 2009) 4

Endangered and Threatened Wildlife and Plants;
Designation of Critical Habitat for Dusky
Gopher Frog (Previously Mississippi Gopher
Frog); Final Rule and Proposed Rule,
77 Fed. Reg. 35,118 (June 12, 2012) 8

Endangered and Threatened Wildlife and Plants;
Designation of Revised Critical Habitat for the
Northern Spotted Owl; Final Rule,
77 Fed. Reg. 71,876 (Dec. 4, 2012) 4

Endangered and Threatened Wildlife and Plants;
Revised Designation of Critical Habitat for the
Contiguous United States Distinct Population
Segment of the Canada Lynx and Revised
Distinct Population Segment Boundary; Final Rule,
79 Fed. Reg. 54,782 (Sept. 12, 2014) 4

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States; Final Rule, 75 Fed. Reg. 63,898 (Oct. 18, 2010) 4

Interagency Cooperation–Endangered Species Act of 1973, 43 Fed. Reg. 870 (Jan. 4, 1978) 14

Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat; Final Rule, 81 Fed. Reg. 7414 (Feb. 11, 2016) 21

National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003) ... 31

Legislative Materials

124 Cong. Rec. 21,355 (1978) 16

124 Cong. Rec. 21,575 (1978) 17

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124 Cong. Rec. 38,665 (1978) 6, 17

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H.R. Rep. No. 95-1625 (1978)
(Endangered Species Act Amendments of 1978: Report to Accompany H.R. 14104) ..... *passim*

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(Endangered Species Act Amendments of 1982: Report to Accompany H.R. 6133) 31

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(Administrative Procedure Act: Report of the Committee on the Judiciary on S. 7) 26

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(Endangered Species Act Amendments of 1978: Report to Accompany S. 2899) 14, 17, 20

Other Sources

Merriam-Webster's Collegiate Dictionary (11th ed. 2005) 21

John M. Frywell, *et al.*, *Wildlife Ecology, Conservation, & Management* (3d ed. 2014) ... 12

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INTERESTS OF THE *AMICI CURIAE*

The American Farm Bureau Federation (Farm Bureau), CropLife America (CLA), National Alliance of Forest Owners (NAFO), and National Mining Association (NMA) respectfully submit this brief as *amici curiae* in support of the Petitioner.[1]

The Farm Bureau is an independent, non-governmental, voluntary general farm organization with nearly six million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary function is to advance and promote the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting, and representing the business, economic, social, and educational interests of American farmers and ranchers.

CLA is a national, not-for-profit trade association that represents developers, manufacturers, formulators, and distributors of crop protection products and plant science solutions for agriculture and pest management in the United States. CLA's many registrant member companies produce pesticides registered with EPA for use in the United States under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of this brief.

NAFO is a trade association that represents owners and managers of over 80 million acres of private forests in 47 states. NAFO was incorporated in March 2008, and has been working aggressively since then to sustain the ecological, economic, and social values of forests, and to assure an abundance of healthy and productive forest resources for present and future generations.

NMA is the national trade association of the mining industry. NMA has more than 300 members, including those who produce most of the nation's coal, metals, industrial, and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state, and local taxes each year. A core mission of NMA is to promote practices that foster the environmentally sound development and use of mineral resources.

The *amici* have a substantial interest in this case because the designation of private property as critical habitat under the Endangered Species Act (ESA) is a remarkably intrusive action that imposes significant burdens on landowners and restricts their ability to fully utilize their property. The U.S. Court of Appeals for the Fifth Circuit endorsed an expansive interpretation of critical habitat by upholding the protection of an area that is not only unoccupied but also unsuitable and uninhabitable by the species. In doing so, the Fifth Circuit destroyed the statutory distinction between occupied and unoccupied critical habitat and contravened Congressional intent by granting the Secretary "virtually limitless" power to

designate critical habitat. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 651 (5th Cir. 2017) (Jones, J., dissenting from Denial of Rehearing En Banc). "[T]he ramifications of this decision for national land use regulation . . . cannot be underestimated." *Id.* at 637.

The specter created by the Fifth Circuit's erroneous interpretation of what qualifies as critical habitat is unremittingly chilling in its implications for ongoing activities on private property. This over-expansive interpretation of the ESA "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). A critical habitat designation can freeze the operations of property designated as critical habitat in perpetuity. While such restrictions are only triggered by a discretionary federal agency action subject to ESA Section 7 "consultation," 16 U.S.C. § 1536(a)(2), the nexus between federal agency actions and private land use is exceedingly broad, and includes Clean Water Act permitting, FIFRA pesticide registrations, financial assistance, and other programs from the National Resources Conservation Service, Small Business Administration loan guarantees, Federal Emergency Management Agency flood insurance, and other Army Corps of Engineers permits.

The consultation requirement imposes a federal management overlay upon private lands with significant regulatory and economic ramifications under the ESA. A private property owner is barred from

obtaining any discretionary federal permits, authorizations, funding, or other agency actions without first being subject to a review to ensure that there will be no destruction or adverse modification of critical habitat. Further, if the property owner's activities may adversely affect a threatened or endangered species or its critical habitat, those activities may be significantly curtailed or subject to conditions that impair the productivity and use of that property.

The *amici* have members that are engaged in timber, agriculture, mining operations, and other related activities on privately owned property. They will suffer economic injury and, in many instances, the deprivation of the use and enjoyment of their property due to the consequential restrictions on land use activities arising from a designation of their land as critical habitat. These impacts are not limited to the facts of this case, but are occurring nationwide through the increasing trend of geographically expansive critical habitat designations. These designations impose economic impacts of millions of dollars annually and, sometimes, result in the outright rejection or cessation of ongoing activities that serve the development needs of the Nation.[2] These restrictions

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[2] *See, e.g.*, 74 Fed. Reg. 52,300, 52,300 (Oct. 9, 2009) (designating all potential critical habitat for the green sturgeon would have annualized economic impact of $64 million to $578 million); 75 Fed. Reg. 63,898, 63,920 (Oct. 18, 2010) (potential incremental impacts of bull trout critical habitat estimated at $56.3 to $80.9 million over 20 years); 77 Fed. Reg. 71,876, 71,946 (Dec. 4, 2012) (northern spotted owl critical habitat could have up to a $6.4 million annual impact); 79 Fed. Reg. 54,782, 54,829 (Sept. 12, 2014) (Canada lynx critical habitat could have up to $805,000 annual cost).

and negative effects are even more alarming when, as here, the land is unoccupied by the relevant species and lacks the features making it viable habitat. This Court must restrain the "virtually limitless" power conferred by the Fifth Circuit, and restore the designation of critical habitat to the bounds that Congress intended and explicitly prescribed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress added a narrow definition of critical habitat to the ESA in 1978 to restrain the prevailing practice of designating expansive areas of land with no regard to what was actually necessary for species conservation. In doing so, Congress struck a balance between the need to protect habitat for threatened and endangered species and the need to ensure that the exercise of regulatory powers affecting the economic and productive use of land is wielded with focused circumspection.

The application of the ESA is triggered when the Secretary determines to list a species as either threatened or endangered. 16 U.S.C. § 1533(a)(1). Concurrent with a listing decision, to the maximum extent prudent and determinable, the Secretary shall "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i) (emphasis added). The Secretary must base the designation on "the best scientific data available . . . after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). The Secretary is authorized to exclude any area from critical habitat if "the benefits of such

exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless an exclusion would result in the extinction of the species concerned. *Id.*

Congress did not envision the designation of critical habitat "as far as the eyes can see and the mind can conceive." 124 Cong. Rec. 38,131 (1978). Rather, Congress crafted an "extremely narrow definition of critical habitat" that imposed clear standards and statutory boundaries to restrain the overbroad assertion of federal regulatory power. 124 Cong. Rec. 38,665 (1978). For occupied habitat, the designation of critical habitat is limited to "specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). For unoccupied habitat, Congress imposed a heightened standard—critical habitat only can be designated for "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

A critical habitat designation triggers the application of Section 7 of the ESA, whereby a federal agency must "consult" with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) (collectively, the Services) on any action authorized, funded, or carried out that may affect

critical habitat.[3] 16 U.S.C. § 1536(a)(2). During consultation, if FWS or NMFS concludes that the action will destroy or adversely modify critical habitat, then a reasonable and prudent alternative (RPA) to the proposed action is developed to avoid the destruction or adverse modification.[4] *Id.* § 1536(b)(4)(A). A private party applicant or partner to the federal agency action must typically implement the RPA or be subject to denial of its application or project. These Section 7 consultations impose "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). Where the federal action authorizes some activity on private land, the costs are borne by the private party, not by the federal agency.[5]

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[3] The relevant regulations define "action" expansively to include the "granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2017).

[4] If the action will cause the incidental take of a listed species, FWS or NMFS also will specify reasonable and prudent measures (RPMs) to minimize the impact of the taking. 16 U.S.C. § 1536(b)(4)(C)(ii). These RPMs impose terms and conditions that can impose further restrictions on the use of property.

[5] The costs of consultation include, for example, conducting biological surveys and assessments—including multiple site visits, hiring of technical experts, and subsequent analyses—which can reach hundreds of thousands of dollars. Compliance costs for measures to avoid or minimize the effects of the proposed action on

In the decision below, the closely divided Fifth Circuit panel upheld the designation of more than 1,500 acres of private forest land (Unit 1) in Louisiana as unoccupied critical habitat for the dusky gopher frog. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016). The FWS conceded that Unit 1 only contains one of the three physical or biological features that comprise habitat for the species (ephemeral ponds) and that, in its present state, Unit 1 is "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. 35,118, 35,129 (June 12, 2012); JA145 (emphasis added). Furthermore, Unit 1 is located about 50 miles from existing populations, and natural dispersal of frogs to the area is not possible. *See id.* at 35,130; JA145-46. Even if dusky gopher frogs were introduced into Unit 1, they would not survive.

The Fifth Circuit wrongly held that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468. The plain language of ESA Section 4 explicitly limits critical habitat to a subset of "any habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit's decision condones the designation of admittedly unsuitable and uninhabitable land based on the mere presence of one physical feature that, alone, cannot support the dusky gopher frog. This decision sets a remarkably low bar for the designation of critical habitat—there is no requirement for existing habitat,

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designated critical habitat areas can be crippling. The consultation process itself also has economic impacts because it "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." 43 Envtl. L. Rep. News & Analysis at 10,681.

no requirement for suitability, and no reasonable expectation that the area will be used for the conservation of the species.

The Fifth Circuit also "play[s] havoc with administrative law" by holding that FWS's decision not to exclude Unit 1 from designated critical habitat is unreviewable. *Markle*, 848 F.3d at 652 (Jones, J., dissenting). On the contrary, the Administrative Procedure Act (APA) provides a strong presumption of judicial review of final agency actions, including those that involve discretionary agency decision-making. While ESA Section 4(b)(2) contains a cost-benefit standard that applies to decisions on whether to exclude areas from critical habitat, the Fifth Circuit subverted this provision and acquiesced to the imposition of up to $34 million in economic costs with "virtually nothing on the other side of the economic ledger." *Id.* at 653. This is contrary to Congressional intent, and disregarded precedent from the Court concluding that such decisions are judicially reviewable for abuse of discretion.

ARGUMENT

I. Designation of Unoccupied Critical Habitat Requires that the Specific Areas Be Both Habitat for the Species and Essential to Its Conservation.

A. The ESA's Plain Language Limits Critical Habitat to Specific Areas Within Existing Habitat.

The decision below impermissibly authorizes the Secretary to designate almost any land or waterbody within the United States as critical habitat for an ESA-listed species, even in places where the species could not currently survive. The Fifth Circuit erroneously held, "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468 (emphasis added). This conclusion contravenes the ESA's explicit statutory requirements.

Section 4 clearly delineates "critical habitat" as a subset of "habitat." The Secretary can only "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Thus, "[w]hatever is 'critical habitat,' according to this operative provision, must first be 'any habitat of such species.'" *Markle*, 848 F.3d at 640 (Jones, J., dissenting). This "clear habitability requirement" dictates the scope of the narrower designation of occupied and unoccupied areas as critical habitat for a species.

The Court has emphasized, "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). And, "when the statute's language is plain, the sole

function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* The use of "habitat" within Section 4 was purposeful and must be construed to have meaning. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). Because Congress used different terminology—"habitat" versus "critical habitat"—this Court must assume that different meanings were intended. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). The only interpretation that gives this distinction any operative effect is if critical habitat is viewed as the "specific areas" within a species' broader habitat.

While not defined in the ESA, "habitat" is commonly understood to be:

> the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat.

Linnea S. Hall, *et al.*, *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, *et al.*, *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat).").

Furthermore, properly interpreted, habitat can only be designated as critical habitat if that habitat exists at the time of the designation. The ESA states that, to the maximum extent prudent and determinable, the Services shall "concurrently with making a determination . . . that a species is [endangered or threatened], designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This imposes a temporal requirement that an area must already possess the necessary physical or biological features comprising habitat for the species in order to qualify for the narrower critical habitat designation.[6] The Services cannot designate degraded or uninhabitable areas as critical habitat based on the possibility that sometime in the future those areas may somehow become habitat.[7] The habitat considered for

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[6] Under the ESA, the critical habitat designation is required to be made concurrent with listing a species, but may later be revised or updated pursuant to other provisions of the Act. In each instance, at the time the designation is made, the Services must determine what areas can be categorized as habitat for the species and what portions of those areas should be designated as critical habitat.

[7] The designation of critical habitat is subject to the requirement to use the best scientific data available, which ensures that the ESA is not "implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

designation must already exist and be capable of supporting the survival of the species.

For areas that are not currently occupied by the species, the requirement for habitability ensures that the designation of critical habitat and application of the ESA does not create illogical results. As in the present case, it is axiomatic that an area where the dusky gopher frog cannot survive (even if relocated there) cannot provide a conservation benefit to the species. By divorcing "habitat" from "critical," the Fifth Circuit's reasoning allows almost any area to be designated as critical habitat with no restrictions on scope or the attendant regulatory impositions on affected landowners. This is contrary to the explicit statutory safeguards that Congress provided.

B. Congress Intended to Limit Critical Habitat to a Subset of the Species' Habitat.

As enacted in 1973, the ESA did not contain a definition of critical habitat or specify how it was to be designated.[8] In 1978, the Services promulgated regulations that defined "critical habitat" as:

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[8] The only reference to critical habitat in the 1973 ESA was the prohibition on federal agencies taking action that "jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892. Congress intended that critical habitat would be acquired and protected pursuant to ESA Section 5. *Id.* § 5, 87 Stat. at 889; H.R. Rep. No. 93-740, at 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species.") (emphasis added).

> any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added). Shortly thereafter, the Court enjoined construction of the nearly completed Tellico Dam Project to protect the endangered snail darter and prevent the destruction of its critical habitat. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."). In response to these events, and the expansive designation of critical habitat for other species,[9] Congress amended the ESA to explicitly define critical habitat and limit the scope of such designations to alleviate the resulting significant economic and regulatory impacts.

Congress's efforts demonstrate a clear intention that critical habitat designations are limited to areas that are habitable by the species and that unoccupied

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[9] For example, Congress was particularly concerned about a proposal to designate up to 10 million acres of Forest Service land as critical habitat for the grizzly bear. Much of the proposed designation was "not habitat that is necessary for the continued survival of the bear," but was being designated so that the present population "within the true critical habitat" could expand. S. Rep. No. 95-874, at 10 (1978).

habitat should only be designated sparingly based on heightened criteria. Notably, Congress recognized that an area must first be functioning habitat for a species before the more specific areas of critical habitat could be designated within that habitat. For example, as amended, House Bill 14104 defined unoccupied critical habitat as:

> specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.

124 Cong. Rec. 38,154 (1978) (emphasis added). The House Committee on Merchant Marine and Fisheries noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat."[10] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added). Instead, the Committee directed the Secretary to "be exceedingly circumspect in the

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[10] During floor debate on House Bill 14104, Representative Bowen stated that "I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species." 124 Cong. Rec. 38,131 (emphasis added).

designation of critical habitat outside the presently occupied area of the species." *Id.* at 18 (emphasis added).

The corresponding Senate Bill 2899 also included a definition of unoccupied critical habitat, which limited it to:

> specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.

124 Cong. Rec. 21,355 (1978) (emphasis added).[11] For unoccupied areas, the Senate Committee on Environment and Public Works stated that "[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[']

[11] Regarding his amendment, Senator McClure explained that "this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area." *Id.*

continued survival."[12] S. Rep. No. 95-874, at 10 (emphasis added).

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House." 124 Cong. Rec. 38,665. That definition remains in effect today. The legislative history clearly demonstrates that Congress was focused on habitat of species which could then be designated as either occupied or unoccupied critical habitat if the area satisfied the relevant definitional criteria. *Markle*, 848 F.3d at 642 n.4 (Jones, J., dissenting) ("uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat"). Contrary to the Fifth Circuit's conclusion, this habitability requirement was understood by Congress at the outset and incorporated into the operative provisions of the ESA.

C. Designation of Unoccupied Habitat Is a More Demanding Standard that Requires the Entire Area to be Essential for the Conservation of the Species.

The Fifth Circuit found that "only occupied habitat must contain all of the relevant [physical or biological

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[12] In explaining the role of critical habitat, Senator Garn stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question." 124 Cong. Rec. 21,575 (1978) (emphasis added).

features]," and upheld the designation of the unoccupied Unit 1 despite it only containing one of the three features that are essential to the conservation of the species. *Markle*, 827 F.3d at 468 & 472 n.20. The decision illogically establishes that the same conditions—a lack of all relevant physical or biological features—can justify the designation of an unoccupied area, but not an occupied area, as critical habitat. This is contrary to Congressional intent and erroneously lowers the bar for designating unoccupied critical habitat.

The ESA, its legislative history, and court precedent all unquestionably demonstrate that "an unoccupied critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation." *Markle*, 848 F.3d at 648 (Jones, J., dissenting). In defining critical habitat, Congress explicitly distinguished between occupied and unoccupied habitat. Occupied habitat requires the presence of "features [that are] essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Conversely, unoccupied habitat requires "specific areas . . . [that] are essential to the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). From a biological perspective, the use of "features" for occupied habitat and "areas" for unoccupied habitat is inherently logical. An already occupied area is, by definition, habitat for the species, so a focus on physical or biological features ensures that the critical components of that habitat are identified. Because unoccupied areas may or may not have habitat, the analysis must expand beyond mere features to consider the habitability of the area as a

whole, otherwise the designation would provide no conservation benefit to the species.

The use of these disparate statutory terms—"features" versus "areas"—clearly connotes that different standards apply to the designation of occupied and unoccupied habitat. *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted). To give these terms independent meaning, the designation of unoccupied habitat must require more than the presence of a single feature.

Disregarding this statutory construct, the Fifth Circuit contradicted all relevant precedent by making "it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." *Markle*, 848 F.3d at 646 (Jones, J., dissenting). In contrast, the U.S. Court of Appeals for the Ninth Circuit has stated:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010); *see also Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) (designation of unoccupied habitat "is a more demanding standard than that of occupied critical

habitat"). Numerous district courts also have concluded that the designation of unoccupied habitat requires more than the standard for designating occupied areas. *E.g.*, *Cape Hatteras Pres. All. v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential"); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("ESA imposes a more onerous procedure on the designation of unoccupied areas"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("more demanding [standard] than that of unoccupied habitat"). The Fifth Circuit's anomalous decision is contrary to established case law, and subverts Congressional intent and the ESA statutory criteria which impose a heightened standard for the designation of unoccupied critical habitat.[13]

The Fifth Circuit's decision extinguished the statutory criterion that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The purposeful use of "essential" should not be ignored. To be "essential," the designated habitat must be "of the utmost importance"

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[13] In adopting the definition of "critical habitat," Congress sought to constrain the ability of the Secretary to designate unoccupied habitat. The Senate found that there is "little or no reason to give exacti the same status to lands needed for population expansion as is given to those lands which are critical to a species[']s continued survival." S. Rep. No. 95-874, at 10 (emphasis added). Likewise, the House directed the Secretary to be "exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (emphasis added).

or "indispensable" for the conservation of a species. *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005). Congress clearly understood that its use of "essential" would impose a stringent limitation on the areas that could be designated as critical habitat.[14] The operative effect of this term is particularly apparent where, as here, the unoccupied area is not connected to occupied areas, would require extensive modifications and annual maintenance to become suitable habitat, and is not subject to current or anticipated restoration efforts or conservation measures. *Markle*, 827 F.3d at 481 (Owens, J., dissenting). By upholding the designation of Unit 1, the Fifth Circuit removed any principled limitation on the Secretary's ability to designate critical habitat and rendered this authority "virtually limitless."[15] *Markle*, 848 F.3d at 649-51 (Jones, J., dissenting). This is contrary to what Congress intended and what the ESA explicitly commands.

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[14] As Representative Duncan explained, "I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." 124 Cong. Rec. 38,154 (emphasis added).

[15] In part, the Fifth Circuit justified its decision based on a then-existing regulatory requirement that the Secretary could only designate an unoccupied area as critical habitat "when a designation limited to its present range would be inadequate to ensure the conservation of the species." *Markle*, 827 F.3d at 470 (citing 50 C.F.R. § 424.12(e)). The Services subsequently deleted this requirement from their regulations. *See* 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016).

D. Congress Provided Other Mechanisms for the Identification and Protection of Areas that May Later Become Habitat and Provide Benefits to a Species.

Congress did not intend for a critical habitat designation to be the sole mechanism by which the Services would attempt to identify and protect uninhabitable areas that may someday benefit a species. Instead, the ESA provides other statutory mechanisms to achieve that function.

First, the Services are required to develop and implement recovery plans for listed species. 16 U.S.C. § 1533(f)(1). In particular, these recovery plans describe the "site-specific management actions" that are necessary to achieve the conservation and survival of the species. *Id.* § 1533(f)(1)(B)(i). While not imposing mandatory obligations, recovery plans identify proactive measures, such as the ecological restoration of habitat or implementation of conservation measures, that can be undertaken by the Services or other stakeholders to achieve a species' recovery.[16]

Second, under ESA Section 5, the Secretary can acquire land, irrespective of whether it qualifies as habitat, to conserve listed species. 16 U.S.C. § 1534(a)(2) (authorization "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants). As the

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[16] NMFS & FWS, *Interim Endangered and Threatened Species Recovery Plan Guidance*, § 1.1 (June 2010), https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf.

Court has recognized, this authority may be "useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species." *Babbitt*, 515 U.S. at 703 (emphasis added).

Finally, a critical habitat designation is not a singular, determinative action that is only taken concurrent with the listing of a species and never re-visited. In fact, the Services "may, from time-to-time thereafter as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A)(ii). A revision to critical habitat also can be initiated by a petition from an interested person. *Id.* § 1533(b)(3)(D). Thus, while an area that is uninhabitable at the time of listing (such as Unit 1 in the present case) cannot be designated as critical habitat, nothing in the ESA precludes the ability to designate that area in the future if and when it becomes habitat and satisfies the additional requirements for occupied or unoccupied critical habitat.

II. Judicial Review Applies to Decisions Not to Exclude Areas from Critical Habitat.

The Fifth Circuit's decision undermines a crucial provision of the ESA, and leaves affected landowners with no judicial recourse to challenge the non-exclusion of an area from critical habitat when there are disproportionate impacts. The ESA mandates that FWS "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2) (emphasis added). Based on this consideration, FWS "may exclude any area from critical habitat if he determines that the benefits of

such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (emphasis added). The ESA prevents FWS from excluding areas from critical habitat only if it "will result in the extinction of the species concerned." *Id.* Thus, the consideration of economic impacts, and whether to exclude an area from critical habitat based on such impacts, is an essential component of the Services' designation of critical habitat.

Based on a misinterpretation of the statute, the Fifth Circuit concluded that a decision not to exclude an area from critical habitat is committed to agency discretion by law and is therefore unreviewable. *Markle*, 827 F.3d at 473 (citing 5 U.S.C. § 701(a)(2)). The Fifth Circuit found that "Section 1533(b)(2) articulates a standard for reviewing [FWS's] decision to exclude an area [but] is silent on a standard for reviewing [FWS's] decision to not exclude an area." *Id.* at 474 (emphasis in original).

The ramifications of the Fifth Circuit's decision have significant consequences. The landowners could suffer up to $34 million in economic costs with "virtually nothing on the other side of the economic ledger." *Markle*, 848 F.3d at 653 (Jones, J., dissenting). However, these and other similarly situated landowners are now foreclosed from seeking judicial review in such circumstances. This outcome "play[s] havoc with administrative law." *Id.* at 652.

A. The Fifth Circuit Disregarded the Strong Presumption of Judicial Review of Administrative Action.

Based on the use of the permissive word "may," the Fifth Circuit concluded that a decision not to exclude an area from critical habitat is committed to agency discretion and therefore unreviewable.[17] The Fifth Circuit stated that Section 4(b)(2) "establishes a discretionary process by which [FWS] may exclude areas from designation, but it does not articulate any standard governing when [FWS] must exclude an area from designation." *Markle*, 827 F.3d at 474 (emphasis in original). Finding "no meaningful standard against which to judge the agency's exercise of discretion," the Fifth Circuit concluded that judicial review was unavailable. *Id.* at 473 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The Fifth Circuit's holding is contrary to the strong presumption of judicial review under both the APA and this Court's precedent.

With limited exceptions, the APA provides a right of judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In construing the scope of the APA, the Court has found that it "manifests a congressional intention that it cover a broad spectrum of administrative actions," and that its "'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) (citation omitted). Accordingly, "only upon a showing

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[17] The Fifth Circuit found that the ESA only "explicitly mandates 'consideration' of 'economic impact,'" which FWS satisfied by the commissioning of an economic report. *Markle*, 827 F.3d at 474 (citation omitted).

of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. Recognizing that Congress rarely intends to preclude the enforcement of its directives to federal agencies, the Court has repeatedly reaffirmed that the APA creates "a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).

The Fifth Circuit based its holding on the APA provision that prevents judicial review when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). However, "[t]his is a very narrow exception." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Based on the legislative history of the APA, the Court found that it is only applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (citing S. Rep. No. 79-752, at 26 (1945)) (emphasis added).

The Fifth Circuit erroneously relied on the Court's decision in *Heckler* to support its broad interpretation of the APA exemption. In *Heckler*, the Court found that an agency's decision not to take enforcement action under the Federal Food, Drug, and Cosmetic Act was unreviewable because such a decision "has traditionally been 'committed to agency discretion.'" *Heckler*, 470 U.S. at 831-32 (recognizing the "general unsuitability for judicial review of agency decisions to refuse enforcement"). The Court noted that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

However, *Heckler* only establishes the presumption of unreviewability in the context of enforcement actions. Even then, the Court found that it may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833 ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers").[18]

The Fifth Circuit's reliance on *Heckler* also fails because a refusal to take enforcement action cannot be conflated with a refusal to exclude an area from critical habitat. As the Court stated, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832 (emphasis in original). Here, FWS's decision not to act on a critical habitat exclusion yields the opposite result—the area is included within designated critical habitat and subject to the imposition of burdensome permitting requirements and federal agency restrictions. This is the same coercive power that justifies judicial review according to the Court's *Heckler* decision.

The Court has not expanded the scope of the APA's "committed to agency discretion" standard such that it would include a decision not to exclude an area from

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[18] "If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section." *Heckler*, 470 U.S. at 834-35.

critical habitat. Instead, the Court has identified other narrow categories of administrative decisions that have traditionally been deemed discretionary and therefore unreviewable. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (agency's refusal to grant reconsideration of an action because of material error); *Webster v. Doe*, 486 U.S. 592, 599-601 (1988) (decision to terminate an employee in the interests of national security); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (agency's allocation of funds from a lump-sum appropriation). Outside of these delineated circumstances, the Court has continued to apply its presumption of judicial review of agency action. *E.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (noting "APA's presumption of reviewability for all final agency action") (citation omitted).

Contrary to the Fifth Circuit's interpretation, the use of the word "may" is not dispositive and does not negate the presumption of reviewability. Focusing on the use of "may," the Fifth Circuit concluded that this permissive language made the agency's decision not to act "presumptively unreviewable." *Markle*, 827 F.3d at 474 (citing *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015)). However, the Court has previously rejected arguments that the use of permissive terms commits a matter exclusively to agency discretion. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("the permissive term 'as he may deem proper,' by itself, is not to be read as a congressional command which precludes a judicial determination of the correct application of the governing canons"); *Mulloy v. United States*, 398 U.S. 410, 414-15 (1970) (provision that Selective Service board "may reopen" draft

classification does not allow arbitrary refusal to reopen when applicant establishes a prima facie case for a new classification).[19] Thus, while the word "may" suggests some discretion, there is no indication in the statute that the Services have absolute discretion to determine whether to exclude an area from critical habitat. *Bennett*, 520 U.S. at 172 ("Secretary's ultimate decision is reviewable only for abuse of discretion"); 5 U.S.C. § 706(2)(A) (reviewing court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

B. Congress Provided Clear and Meaningful Standards for the Exclusion of Areas from Critical Habitat.

The imposition of draconian economic costs for minimal conservation gain motivated Congress to amend the ESA to include consideration of economic impacts and the authority to revise a critical habitat designation. Pursuant to the Fifth Circuit's holding, the Services would have unfettered and unreviewable discretion to determine whether to exclude an area from critical habitat, irrespective of whether the impacts of the designation significantly outweigh the benefits to the species. By shielding these decisions from judicial review, the Fifth Circuit disregarded the ESA statutory

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[19] *See also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("[w]hen a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show deference to the agency's determination. However, such language does not mean the matter is committed exclusively to agency discretion.") (emphasis in original).

constraints that Congress put into place to guide and restrain the scope of the Services' discretionary power, and reduced the mandatory consideration of economic and other impacts to a meaningless exercise.

As enacted in 1973, the ESA did not include a provision for excluding areas from critical habitat. The significant repercussions of the lack of any qualifying language were made clear by the Court's decision in *TVA*, which found "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *TVA*, 437 U.S. at 185 (emphasis added). The Court stated that the plain language of the ESA "admits of no exception," *id.* at 173 (emphasis added), and that endangered species were to be protected "whatever the cost." *Id.* at 184.

Responding directly to the *TVA* decision, and to expansive designations of critical habitat, Congress amended the ESA in 1978 to provide the Services with the flexibility to consider economic impacts that the Court had previously found lacking.[20] In relevant part,

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[20] H.R. Rep. No. 95-1625, at 14 ("The bill attempts to retain the basis integrity of the [ESA], while introducing some flexibility which will permit exemptions from the Act's stringent requirements."); 124 Cong. Rec. 38,122-23 (1978) (Congress sought to revise the ESA to "take into consideration more accurately the development needs of this Nation" and, while protecting and preserving endangered species, "provide[] an opportunity for human growth, development, and progress, which we feel is an absolutely vital consideration.") (statement of Rep. Bowen); *id.* at 38,138 ("The amendments to the act, for the first time, recognize that there are human considerations to be dealt with and people are an important factor in this equation.") (statement of Rep. Burgener).

the statutory authority to exclude an area from critical habitat stated:

> In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.[21]

Given the consideration of economic impacts, and the authority to revise a critical habitat designation based on this consideration, this was viewed by some as "the most significant provision in the entire bill." 124 Cong. Rec. 38,666 (1978) (statement of Rep. Murphy).

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[21] Pub. L. No. 95-632 § 11(5), 92 Stat. 3751, 3766 (1978). In the 1982 amendments to the ESA, Congress made its penultimate revisions to Section 4(b)(2) to reflect what is essentially its present structure. In doing so, Congress reiterated the importance of economic considerations for critical habitat designations. H.R. Rep. No. 97-567, at 12 (1982) ("Desirous to restrict the Secretary's decision on species listing to biology alone, the committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests."). In 2003, the National Defense Authorization Act amended Section 4(b)(2) to explicitly include consideration of "the impact on national security." Pub. L. No. 108-136 § 318(b), 117 Stat. 1392, 1433 (2003).

One of the primary purposes of the amendment was to ensure the consideration of economic impacts in the designation of critical habitat. *See* H.R. Rep. No. 95-1625, at 17 ("Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat . . . takes on significant added dimensions."). Specifically, Congress explained that "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species." *Id.* Within the scope of this mandatory consideration of economic and other impacts, Congress provided the Services with flexibility in determining the weight and priority to afford the relevant impacts. *Id.* ("The consideration and weight given to any particular impact is completely within the Secretary's discretion"). However, this discretion does not obviate the requirement that the Services consider economic impacts at the time of a critical habitat designation.

In addition, Congress authorized the Services to modify a proposed critical habitat designation when the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat. As Congress explained,

> Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of [a species]. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely

> biological criteria. In some situations, no critical habitat would be specified.

Id. (emphasis added). The purpose of this authorization is to "cause the Secretary to be more judicious in specifying such a critical habitat," and to avoid conflicts between [species] and Federal activities at an early stage. 124 Cong. Rec. 38,128 (1978); H.R. Rep. No. 95-1625, at 16.

Seeking to harmonize species conservation with the Nation's development needs, Congress revised the criteria for the designation of critical habitat to include a mandatory consideration of economic and other impacts associated with the inclusion of a particular area as critical habitat. To ensure that this consideration of impacts was actually applied in the designation process, Congress also included a balancing test whereby the Services would determine whether to exclude an area from critical habitat (i.e., if the benefits of exclusion outweigh the benefits of inclusion), limited only by the obligation to ensure that the exclusion did not result in the extinction of the species. Rather than instilling the Services with absolute discretion regarding the final scope of a critical habitat designation, these standards were intended to direct the Services in the exercise of their authority to exclude areas from critical habitat. Indeed, contrary to the Fifth Circuit's decision, the fundamental purpose of these amendments was to ensure that the Services designate critical habitat more judiciously and alleviate the economic and other impacts resulting from more expansive or unfounded designations.

C. The Court Has Already Recognized that Judicial Review Applies to Decisions under ESA Section 4(b)(2).

The Fifth Circuit's holding that a decision not to exclude critical habitat is unreviewable clashes with the Court's decision in *Bennett*, 520 U.S. 154. There, the Court determined that ESA Section 4(b)(2) is not wholly discretionary and therefore incapable of judicial review under the APA. *Id.* at 172. The Fifth Circuit failed to address, let alone reconcile, this component of the *Bennett* decision. *Markle*, 848 F.3d at 654 (Jones, J., dissenting).

In *Bennett*, the Court considered a challenge to a biological opinion pursuant to the ESA citizen suit provision based, in part, on the argument that it was an implicit critical habitat determination in violation of the requirements of Section 4(b)(2).[22] The government sought to dismiss the claim by asserting that the Secretary's duties were discretionary. Rejecting that assertion, the Court stated that "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Bennett*, 520 U.S. at 172. While noting the statutory distinction between the mandate to consider economic and other impacts and the permissive authority to exclude any area from critical habitat, the Court did not find this to be dispositive. On the contrary, the Court concluded "the fact that the Secretary's ultimate decision is reviewable only for

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[22] In part, the ESA citizen-suit provision allows any person to commence a civil suit against the Secretary "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C) (emphasis added).

abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (emphasis omitted).

Bennett confirms that a decision on whether or not to exclude an area from critical habitat is judicially reviewable under the APA. The Services cannot ignore the required procedures of decision-making and must consider the economic and other impacts of a critical habitat designation. While the ultimate decision on excluding a particular area entails some discretion, the Court concluded that it is reviewable under the APA's abuse of discretion standard.

The ability to seek judicial review of a decision not to exclude critical habitat is a necessary protection of the interests of private property owners. Section 4(b)(2) is the singular instance where Congress explicitly directs the Services to consider and ameliorate the economic and regulatory burdens associated with a decision under the ESA. However, with no judicial recourse, affected property owners are at the mercy of "agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 177. The result, as exemplified by this case, is the irrational imposition of millions of dollars in economic costs with no corresponding demonstrable conservation benefit to the species. Judicial review provides the indispensable mechanism for property owners to restrain this arbitrary exercise of administrative power.

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the decision of the Fifth Circuit be reversed.

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April 30, 2018